

BEFORE THE WEST VIRGINIA BOARD OF MEDICINE

**WEST VIRGINIA BOARD OF MEDICINE,
Petitioner,**

v.

**KEVIN MICHAEL CLARKE, M.D.,
Respondent.**

ORDER

This proceeding arises under the West Virginia Medical Practice Act, West Virginia Code §30-3-1, *et seq.* It is a disciplinary proceeding involving the status of the license to practice medicine and surgery in the State of West Virginia of Kevin Michael Clarke, M.D. The West Virginia Board of Medicine (hereinafter "Board" or "the Board") is the duly authorized state agency to oversee and conduct physician disciplinary hearings pursuant to the provisions of West Virginia Code §30-3-14.

This proceeding was initiated by a Complaint and Notice of Hearing issued on behalf of the Board dated October 15, 2010. Hearing Examiner Carole A. Lewis Bloom granted Petitioner's Motion to Continue on January 13, 2011, and the matter then came on for hearing on February 15 and 16, 2011, in the Hearing Room of the Board at 101 Dee Drive, Charleston, West Virginia. Petitioner was present by its Executive Director, Robert C. Knittle and represented by its General Counsel, Deborah Lewis Rodecker. Respondent Kevin Michael Clarke, M.D. was present in person and by counsel, James D. McQueen, Jr. At the hearing, the Board presented as witnesses Dr. Clarke, Sgt. Phillips, Dr. Ralph Smith, Leslie Thornton, Jennifer Malone, Dana Clarke, Mary Lauderback and Executive Director Knittle and placed nine (9) exhibits in the record, including the video deposition of Dr. Deloris Kline. Dr. Clarke testified on his own behalf and presented Dr. Bobby Miller as his witness at the hearing. He offered two (2) exhibits that were placed in the record. Both

parties timely filed proposed findings of fact and conclusion of law and Hearing Examiner Bloom took judicial notice of the April 4, 2011, Plea/ Sentencing Order/Order entered by Judge David R. James of the Circuit Court of Marion County, West Virginia, concerning Respondent.

A stenographic record of the hearing was prepared pursuant to 11 CSR 3 12, and in accordance with 11 CSR 3 13, this stenographic record of the hearing, all exhibits and all pleadings were provided to Board members other than those members comprising the Complaint Committee at the the time of the Complaint Committee's finding of "probable cause" regarding Dr. Clarke, those members being Dr. Arnold, Reverend Bowyer, Attorney Henderson, Dr. Ferree and Dr. Wazir. On May 3, 2011, prior to the Board's regular meeting on May 16, 2011, and pursuant to 11 CSR 3 11.5(p), the Recommended Findings of Fact, Conclusions of Law and Recommended Decision of the Hearing Examiner was provided to all Board members other than the Complaint Committee members listed above. On May 11, 2011, each Board member and the independent counsel received an eight (8) page letter from Dr. Clarke's counsel, requesting clemency for his client. Enclosed with the letter were letters from a Logan County nurse, the executive director of the Logan Ambulance Authority, a Logan County doctor of osteopathy and a Logan County physician. At the Board's regular meeting on May 16, 2011, where a quorum of the Board was present and voting, the Board thoroughly considered all this information, and in accordance with 11 CSR 3 7, reached its decision. Dr. Arnold, Reverend Bowyer, Attorney Henderson, Dr. Ferree and Dr. Wazir did not participate or vote in this matter due to their membership on the Complaint Committee at the relevant time. Dr. Faheem presided.

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED
DECISION OF THE HEARING EXAMINER**

PROCEDURAL HISTORY

The Board adopts page 1 and the first two (2) lines of page 2 with the following corrections to the names of the respective counsel: Deborah Lewis Rodecker and James D. McQueen, Jr. and the first page is modified to so state.

ISSUE and MOTIONS

The Board adopts the section Issue and the section Motions on page 2 and the first line of page 3.

FINDINGS OF FACT

The fifteen (15) Findings of Fact on pages 3 through 7 are adopted, with the following modifications:

In Finding of Fact number 6, the word "such" is replaced by the word "the" for clarity.

A Finding of Fact numbered 16 is inserted and adopted on page 8 as follows: "Dr. Clarke is unqualified to practice medicine in the State of West Virginia."

CONCLUSIONS OF LAW

The sentence after the heading and preceding paragraphs is stricken and not adopted for clarity and accuracy.

The eighteen (18) Conclusions of Law on pages 8 through 14 are adopted with the following modifications:

In conclusion of law number 7 on page 10, the words "Dr. Kline," are inserted and adopted after the phrase "testimony of witnesses Sgt. Phillips, Dr. Smith, Dr. Kline," for clarity and consistency. The hearing examiner relied upon the testimony of Dr. Kline for several findings of fact and inadvertently omitted in her name in the credibility conclusion.

A Conclusion of Law numbered 19 is inserted and adopted on page 14 as follows: "Dr. Clarke is unqualified to practice medicine in the State of West Virginia."

RECOMMENDED DECISION

The section on pages 15, 16 and 17 is stricken in its entirety and not adopted. The Board inserts in lieu thereof and adopts the following:

"Based upon the foregoing findings of fact and conclusions of law, the West Virginia Board of Medicine finds that it is proper and essential and in the public health, interest, welfare and safety that the license to practice medicine and surgery in the State of West Virginia of Kevin M. Clarke, M.D. be **SUSPENDED** for a period of five (5) years;

1. That during the first eight (8) months of the suspension period, Kevin M. Clarke, M.D., at his own expense, shall successfully complete an Anger Management Treatment Program that includes attendance at a minimum of twelve (12) sessions with a Mental Health Clinician chosen by Dr. Clarke and approved by the Board, and who shall be responsible for sending monthly progress reports to the Board on or before the last day of each month;

2. That after successful completion of the required Anger Management Treatment Program,

Kevin M. Clarke, M.D., at his own expense shall undergo a complete Forensic Psychiatric Evaluation by a Board-approved physician other than Dr. Ralph Smith and Dr. Bobby Miller;

3. That upon notification to the Board that the physician performing the Forensic Psychiatric Evaluation of Kevin M. Clarke, M.D. opines to the Board that Dr. Clarke has successfully completed his treatment and is ready to return to the practice of medicine and surgery, the Complaint Committee of the Board shall meet with Dr. Clarke and prepare a Consent Decree establishing the expected conduct and any limitations on his practice. The Complaint Committee shall report on this matter to the Board who may then vote to **SUSPEND ENFORCEMENT** of the suspension penalty and place Dr. Clarke on **PROBATION** for the remainder of the original five year period;

4. That during the probationary period, the Board may require Dr. Clarke. to appear before it or a Board committee or may appoint one or more of its members to have interviews with the probationary licensee and report back to the Board on the progress of the licensee. The Board may also obtain information from the Prosecutor or Circuit Court of Marion County or Adult Probation Office of Marion County as to Dr. Clarke's compliance with his probation order.

5. That during the first six (6) months of the probationary period, Dr. Clarke must limit his work hours to forty (40) hours per week; if Dr. Clarke is able to successfully comply with this, he may increase his work hours to sixty (60) hours per week during the second six (6) months of probation. If this is successful, Dr. Clarke may request the Board to remove any work time restrictions after the first year of probation.

6. That Dr. Clarke shall be required to pay the costs of these proceedings, including but not limited to the hearing examiner, the court reporter, the expert witnesses, the attorney advisor and all other costs of investigation and prosecution of this matter, in an amount not to exceed ten thousand (\$10,000.00) dollars to be paid within thirty (30) days of invoicing by the Board.

These changes are made to clarify the hearing examiner's recommendations and make them


consistent with the relevant law. It is consistent with the case *Berlow v. West Virginia Board of Medicine*, 458 S.E. 2d 469 (W. Va. 1995) for the Board to determine the appropriate sanctions to impose as long as the Board gives an explanation for the change, which has been done herein.

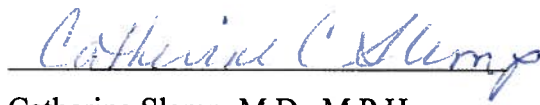
ORDER

In order to give Dr. Clarke time to notify his patients, his license to practice medicine and surgery in the State of West Virginia is SUSPENDED effective June 1, 2011, at 12:00 a.m.

Within thirty (30) days of issuance of an invoice by the Board, Dr. Clarke shall pay to the Board the costs of these proceedings and all other costs of investigation and prosecution of this matter in an amount not to exceed ten thousand (\$10,000.00) dollars.

The foregoing was entered this 16th day of May, 2011.


Rev. O. Richard Bowyer, President


Catherine Slemp, M.D., M.P.H.

BEFORE THE WEST VIRGINIA BOARD OF MEDICINE HEARING EXAMINER

**WEST VIRGINIA BOARD OF MEDICINE,
Petitioner**

v.

**KEVIN MICHAEL CLARKE, M.D.,
Respondent**

**HEARING EXAMINER'S RECOMMENDED FINDINGS OF FACT,
CONCLUSIONS OF LAW AND RECOMMENDED DECISION**

PROCEDURAL HISTORY

This matter came on for hearing on February 15 and 16, 2011, in the Hearing Room of the Board of Medicine, 101 Dee Drive, Charleston, West Virginia, pursuant to a Complaint and Notice of Hearing dated October 15, 2010. Upon Petitioner's motion and without objection, the hearing was continued by the hearing examiner on January 13, 2011. At hearing, the Board of Medicine was represented by Deborah Rodecker, Esquire, General Counsel for the West Virginia Board of Medicine [Board]; Respondent, Dr. Kevin Clarke, appeared in person with counsel, James D. McQueen, Esquire. Proposed Findings of Fact and Conclusions of Law were timely filed by both parties and are considered herein. See Attachment A [Board's Proposed Findings and Conclusions] and Attachment B [Respondent's Proposed Findings and Conclusions]. A Request for Entry of Protective Order filed by Fairmont General Hospital, by counsel Michele Grinberg, Esquire, on January 13, 2011, is considered moot. *Transcript I at 7-9; Transcript II at 156*. Judge David R. James, Circuit Court of Marion County, West Virginia, entered a Plea/Sentencing

Order/Order Placing Defendant on Probation on April 4, 2011, and is considered herein.
Attachment C.

ISSUE

Whether or not the West Virginia Board of Medicine should revoke, suspend or otherwise limit the Respondent's medical license as a result of violation(s) of the West Virginia Medical Practice Act or of any Rule or Order of the West Virginia Board of Medicine.

MOTIONS

All decisions rendered at the hearing in this case on motions filed or otherwise made in this case are hereby affirmed and all other motions filed or otherwise made in this case by either of the parties which were not previously ruled upon by the hearing examiner are hereby denied and rejected. After a review of the record and the exhibits admitted into evidence, any stipulations entered into by the parties, any matter of which the hearing examiner took judicial notice during the proceedings, assessing the credibility of the witnesses, and weighing the evidence in consideration of the same, the hearing examiner makes the following findings of fact and conclusions of law. To the extent that the testimony of any witness is not in accord with these findings and conclusions, such testimony is not credited. To the extent that these findings of facts and conclusions of law are consistent with any proposed findings of fact and conclusions of law submitted by the parties, the same are adopted by the hearing officer and to the extent that the same are inconsistent with such proposed findings and conclusions, they are rejected. Any proposed finding of fact, conclusion of law, or argument proposed and submitted by a party but omitted herein is deemed irrelevant, or unnecessary to the determination of the material

issues in this matter.

FINDINGS OF FACTS

1. Respondent, Kevin M. Clarke, M.D., is a physician licensed in West Virginia since 1988. Dr. Clarke practices Internal Medicine and Emergency Medicine. *Exhibit 8; Transcript I at 78-80.*
2. In April, 2009, Dr. Clarke was working approximately ninety (90) hours per week at a MedPlus Clinic in Fairmont and in various hospital emergency rooms. Additionally he was traveling between various hospitals situated around the state. *Respondent's Exhibit 1 at 2; Transcript I at 78-80, 244.*
3. On April 7, 2009, Dr. Clarke lived in his residence in Fairmont, West Virginia, with his fiancée, Jennifer Malone, and their daughter, Madeline, two (2) years old at the time. On that evening, Dr. Clarke's daughter Karena, eight (8) years old at the time, was also staying at the residence. Dr. Clarke was extremely tired from working long hours and he was upset or "edgy" about personal matters. Dr. Clarke drank some wine. Dr. Clarke was distressed when he called his ex-wife, Dana Clarke, several times over a short period of time, to ask her to come to his home and pick up Karena. When Ms. Clarke arrived to pick up Karena, Dr. Clarke did not say a word to her, but handed Karena to Ms. Clarke and went back into his home. Subsequently, Ms. Malone and Madeline also left the residence. *Board Exhibits 2, 9; Respondent's Exhibit 1 at 2; Transcript I at 42-48, 76-78, 95, 233-244, 262-266.*
4. Subsequently, Dr. Clarke became distraught, picked up a loaded hand gun and fired two full clips, approximately twenty-five bullets, into the wall of his home.

Multiple bullets and/or bullet fragments penetrated the home of Dr. Clarke's next-door neighbor, Deloris Kline, M.D. Multiple bullets fired by Dr. Clarke entered Dr. Kline's kitchen and basement windows, causing property damage. *Board Exhibits 2, 9; Respondent's Exhibit 1; Transcript I at 42-95, 77-78, 236-242.*

5. Dr. Kline called 911. Marion County Sheriff's deputies responded and investigated the incident. Approximately forty (40) guns were seized from Dr. Clarke's residence during the subsequent investigation. After his arrest, Dr. Clarke became angry and cursed at law enforcement officials. Dr. Clarke also told law enforcement officials that "if they came in bleeding or were hurt, [he] would be the physician taking care of them and that [he is] not an enemy to them." *Board Exhibit 2; Transcript I at 43-46, 90-93, 98-125.*
6. As a result of such investigation, Dr. Clarke was charged in a criminal complaint in Marion County Magistrate Court with felony wanton endangerment in April, 2009. *Board Exhibit 2.*
7. As a result of the April 7, 2009, shooting incident, the Board's Complaint Committee initiated a complaint against Dr. Clarke on July 13, 2009. *Board Exhibit 1.*
8. On July 15, 2009, Dr. Clarke responded in writing to the Complaint Committee's Complaint. Dr. Clarke denied the allegations of the complaint. He stated that the shooting incident was "an accident" which was blown out of proportion by the press because of his stature in the community and that the criminal case "will subsequently be dismissed." On or about November 8, 2009, Dr. Clarke

appeared at an informal hearing before the Board's Complaint Committee.
Board Exhibit 1, July 17, 2009 Letter from Kevin M. Clarke, MD, to Michael L. Ferrebee, M.D.

9. On December 18, 2009, Board investigator, Leslie Higginbotham Thornton, investigated the incident and attempted to visit Dr. Clarke's home. Dr. Clarke was not at home. However, Ms. Thornton spoke with Dr. Clarke on the telephone. Dr. Clarke told Ms. Thornton that she could not view the firing range because the ATF did not want to let anyone around the indoor firing range. Subsequently, Dr. Clarke wrote a letter to the Board's Investigator and Complaint Committee stating the following: "I believe I have created a misunderstanding regarding a shooting range at my residence at Rt. 9 Box 495. I misspoke at the hearing and meant to say that my newly purchased [g]un, involved in the incident, was out and I was preparing to fire it for the first time at the firing range. As I stated, I was tired and angry and shot multiple rounds from the gun at a mirror in my residence. One of these projectiles penetrated the foundation footer framing and ricocheted and [h]it [sic] a window of my neighbor Ms. Dee Kline. I am sorry for having caused this confusion because of my misstatement of a shooting range at my residence. . . ." *Board Exhibit 1, December 21, 2009, Letter from Kevin M. Clarke, M.D., to Ms. Higginbotham/Complaint Committee; Transcript I at 194-210, 249-254.*
10. On July 12, 2010, the Board ordered Dr. Clarke to undergo a complete physical and mental examination by Ralph S. Smith, Jr., M.D., Forensic Psychiatrist. Dr. Clarke was examined in Dr. Smith's office on August 5, 2010, and September 1,

2010. During the second day of examination, Dr. Clarke put forth less than adequate effort, answered randomly and told the examiner that he did not care. Dr. Clarke's examination results indicated poor adaptive capacity, irritation, defensiveness and flat affect. Based upon his evaluation, Dr. Smith determined that Dr. Clarke's approach to the evaluation was one of "trying to conceal rather than reveal his issues." Further, certain of Dr. Clarke's scores on standardized tests raised questions for Dr. Smith about Dr. Clarke's "capacity to manage rapidly evolving emergency situations." Based upon this evaluation, Dr. Smith is unable to opine as to whether or not Dr. Clarke can safely practice medicine. *Board Exhibit 1, 5, 6; Transcript I at 69-74, 127-191.*

11. On December 1, 2010, Dr. Bobby Miller, M.D., Forensic Psychiatrist, evaluated Dr. Clarke at the request of Dr. Clarke's attorney. Dr. Clarke put forth adequate effort during the examination. Dr. Miller opines that Dr. Clarke is not cognitively impaired. Dr. Miller diagnosed Dr. Clarke with an Adjustment Disorder with Disturbance of Conduct and Personality Disorder Not Otherwise Specified (Narcissistic Traits). Dr. Miller opines that Dr. Clarke is fit to practice medicine under conditions which provide a limit to his work schedule and which include Anger Management treatment, further Forensic Psychiatric Evaluation and oversight by the Board of Medicine. *Respondent's Exhibit 1; Transcript II at 8-134.*
12. Both Dr. Smith and Dr. Miller noted that during his evaluations, Dr. Clarke attempted to minimize the events of April 7, 2009. Dr. Clarke told Dr. Smith that "one fragment of a bullet ricocheted and went into the window of my neighbor."

Dr. Clarke told Dr. Miller that "a bullet and a fragment" went into his neighbor's house, that it was an "accident," not a "big deal" and should be forgotten. *Respondent's Exhibit 1; Board Exhibit 5; Transcript I at 156; Transcript II at 21-26.*

13. Dr. Clarke wrote a letter to Dr. Miller on December 3, 2010, indicating that he had realized that Dr. Smith and Dr. Miller were correct in their assessments that he had been "concealing." Dr. Clarke described himself as having been "in a defensive posture, hiding the emotional stresses and scars of 5 years of personal turmoil." Dr. Clarke admits that he has also been "defensive" with the police and with the Board of Medicine regarding the investigations of the incident and that he now regrets such behavior and hopes to work to resolve his issues. *Board Exhibit 3; Transcript 1 at 69-74, 95-96.*

14. Since April, 2009, Dr. Clarke has reduced the number of hours per week that he works. *Transcript I at 256-257; Transcript II at 151.*

15. On April 4, 2011, as the result of a plea agreement, Judge David R. James, Circuit Court of Marion County, West Virginia, entered Dr. Clarke's Guilty plea to a misdemeanor offense of Brandishing. Pursuant to Order, Dr. Clarke was sentenced to serve a term of one (1) year in jail, which sentence was suspended, and Dr. Clarke was placed on probation for a period of five (5) years. The terms of Dr. Clarke's probation include that Dr. Clarke shall not possess any firearms, that he shall not consume or possess alcohol or illegal controlled substances and that he shall submit to random drug and alcohol testing. *Attachment C, Plea/Sentencing Order/Order Placing Defendant on*

Probation; Respondent's Exhibit 1; Transcript I at 50-51; Transcript II at 138-149.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Facts and Discussion, I conclude, as a matter of law:

1. West Virginia Code Section 30-3-1 *et seq.* provides the West Virginia Board with the authority to issue licenses to practice medicine and surgery in this state and with the authority to act as the regulatory and disciplinary body for the practice of medicine in this state. WEST VIRGINIA CODE § 30-3-5 (2010).
2. The West Virginia Board of Medicine is authorized to establish regulations necessary to carry out the purposes of the West Virginia Medical Practice Act. WEST VIRGINIA CODE § 30-3-7 (2009). See 11 C.S.R. 1A-et seq.
3. Pursuant to regulation, the Board may designate a hearing examiner to conduct hearings. The undersigned hearing examiner is a licensed attorney and was so designated in this case by the Board. Such hearing was conducted pursuant to West Virginia Code and the West Virginia Board of Medicine Legislative Rules. WEST VIRGINIA CODE § 29A-5-1 *et seq.*; 11 C.S.R. 1-1A-14; 11 C.S.R. 3-11 *et seq.*
4. The West Virginia Board of Medicine has jurisdiction over the matter of the medical licensure of the Respondent, Dr. Kevin Clarke, M.D. WEST VIRGINIA CODE § 30-3-7.
5. At hearing, the rules of evidence as applied in civil cases in the circuit courts of this State were followed. 11 C.S.R. 3-11.5 (c).
6. Clear and convincing proof is necessary for actions taken by the Board of

Medicine concerning physician licensing. Webb v. West Virginia Board of Medicine, 569 S.E.2d 225, 231-2 (W.Va. 2002). The West Virginia Supreme Court defines clear and convincing proof as that measure or degree of proof which produces in the mind of the trier of fact a firm belief or conviction as to the allegations sought to be established. Webb v. West Virginia Board of Medicine, 569 S.E.2d at 232 (citing Wheeling Dollar Savings & Trust Co. v. Singer, 162 W.Va. 502, 510, 250 S.E.2d 369, 374 (1978) (quoting Cross v. Ledford, 161 Ohio St., 469, 477, 120 N.E. 2d 188,123 (1954)); accord In re Carol B., 209 W.Va. 658, 667, 550 S.E.2d 636, 645 (2001).

7. Credibility is determined by the hearing examiner in administrative cases, based upon thorough evaluation of witness testimony. Webb v. West Virginia Board of Medicine, 569 S.E.2d at 232; Maxey v. McDowell Co. Bd. of Ed., 212 W.Va. 668, 575 S.E. 2d 278, Syl. Pt. 3 (2002). The hearing examiner is uniquely situated to make such determination and such determinations are binding unless such determinations are without basis in the record. Webb v. West Virginia Board of Medicine, 569 S.E.2d at 232; Martin v. Randolph County Bd. of Education, 195 W.Va. 297, 465 S.E. 2d 399, 406 (1995); Michael D.C. v. Wanda L.C., 201 W.Va. 381, 497 S.E.2d 531, 538 (1997). Credibility determinations may be based upon many factors, including the following: the general demeanor and comportment of the witness at hearing; the bias or interest of the witness; the consistency or inconsistency of the statements of the witness; the witness's ability and acuteness to observe; the memory of the witness; the reputation for honesty of the witness; and other factors which tend

to cause the trier of fact to believe or disbelieve the testimony of the witness. The hearing examiner finds the testimony of witnesses Sgt. Phillips, Dr. Smith, Ms. Thornton, Ms. Clarke, Ms. Lauderback, Mr. Knittle and Dr. Miller to be credible. Any inconsistency with the foregoing findings of fact or with the testimony of the other credible witnesses was not a result of any deliberate untruthfulness or bias. Rather, any inconsistency was a result of a difference of opinion, lack of knowledge, misperception or misrecollection. The hearing examiner finds the testimony of Dr. Clarke and Ms. Malone not credible insofar as such testimony conflicts with the foregoing findings of fact or with the testimony of the other credible witnesses. In particular, Dr. Clarke and Ms. Malone's testimony regarding the events which precipitated the April 7, 2009, shooting is not wholly credible. The hearing examiner also finds not credible testimony contradicting the finding that Dr. Clarke told the Board's Investigator while she was at his residence that there existed a shooting range in his home. The hearing examiner found most troubling Dr. Clarke's testimony that the loaded gun which he fired on April 7, 2009, was simply lying out in the home he shared with his two young children. However, the hearing examiner finds such testimony credible, despite the concerns regarding Dr. Clarke's judgment which are raised by such testimony. Additionally, despite Dr. Clarke's hearing testimony, the hearing examiner is not convinced that Dr. Clarke has accepted the seriousness and full ramifications of the shooting incident or the need for formal intervention in this matter. Id.

8. West Virginia Board of Medicine has authority to issue licenses to practice

medicine and surgery and with the authority to act as the regulatory and disciplinary body for the practice of medicine and surgery. WEST VIRGINIA CODE § 30-3-5 (2010).

9. It is the purpose of the West Virginia Medical Practice Act to provide for the licensure and discipline of physicians and to provide a professional environment which encourages the delivery of quality medical services within this state. WEST VIRGINIA CODE § 30-3-2; Vest v. Cobb, 76 S.E.2d 885 (W.Va. 1953); See also State ex rel. Hoover v. Smith, 198 W. Va. 507, 482 S.E.2d 124 (1996).
10. The practice of medicine is a high calling and a professional license is a high privilege. Therefore, the state may attach to medical licensure possession onerous and exacting conditions. Barsky v. Board of Regents, 111 N.E.2d 222 (1954) (reh. denied, 112 N.E.2d 773(1954), affirmed 347 U.S. 442 (1954)). See also, State ex rel. D. Webb, M.D. v. W.V. Board of Medicine, 506 S.E.2d 830 (W.Va. 1998); North v. West Virginia Board of Regents, 332 S.E.2d 141 (W. Va. 1985); WEST VIRGINIA CODE § 30-1-1A-(1996). Medical licensure in West Virginia requires not only technical medical competence, but also “a surpassing degree of ethical commitment and sense of human decency.” North v. Board of Regents, 332 S.E.2d 141, 147 (W.V. 1985); See also Savegh v. New York State Education Dept. 601 N.Y.S. 2d 35 (1993).
11. Determinations concerning Respondent’s conduct relative to the standards of unethical, unprofessional, and dishonorable conduct may properly be made by the Members of the Board of Medicine, after hearing, without expert testimony, based upon each Member’s expertise through education, training and

experience. Due deference should be given to the Board's interpretation of the ethical requirements of its profession. Mingo County Medical Society v. Simon, 20 S.E.2d 807, 809, 124 W.Va. 493 (1942); See also Modi v. West Virginia Board of Medicine, 465 S.E.2d 230, 240, 195 W.Va. 230 (1995) (statutes governing expert testimony in tort cases are not strictly applicable in disciplinary proceedings); Pons v. Ohio State Medical Board, 614 N.E. 2d 748 (1991); Batoff v. State Board of Psychology, 750 A.2d 835 (Pa. 2000); In Re Hawkins, 194 S.E.2d 540 (N.C.1973) *cert denied*, 196 S.E.2d 275 (1973) *cert. denied* 414 U.S. 1001, 94 S.Ct. 355 (1973).

12. The West Virginia Board of Medicine may request and the Board, under any circumstances, may require a physician to submit to a physical or mental examination by a physician or physicians approved by the board. A physician submitting to an examination has the right, at his or her expense, to designate another physician to be present at the examination and make an independent report to the investigating body or the Board. The expense of the examination shall be paid by the Board. Any individual who applies for or accepts the privilege of practicing medicine and surgery in this State is considered to have given his or her consent to submit to all examinations when requested to do so in writing by the Board and to have waived all objections to the admissibility of the testimony or examination report of any examining physician on the ground that the testimony or report is privileged communication. If a person fails or refuses to submit to an examination under circumstances which the Board finds are not beyond his or her control, failure or refusal is prima facie evidence of his

or her inability to practice medicine and surgery competently and in compliance with the standards of acceptable and prevailing medical practice. WEST VIRGINIA CODE § 30-3-14 (f) (2005).

13. The West Virginia Board of Medicine may revoke, suspend or otherwise limit a medical license if a physician has engaged in professional incompetence or has displayed the inability to practice medicine and surgery with reasonable skill and safety due to physical or mental impairment, including deterioration through the aging process, loss of motor skill or abuse of drugs or alcohol. WEST VIRGINIA CODE § 30-3-14 (c) (20) and (21); 11 C.S.R. 1A-12.1 (h) (i) (j) and (x).
14. The West Virginia Board of Medicine may revoke, suspend or otherwise limit a medical license if a physician is unqualified as a result of violating a provision of the West Virginia Medical Practice Act or the Board's Legislative Rules or an Order of the West Virginia Board of Medicine. WEST VIRGINIA CODE § 30-3-14 (c) (17).
15. The West Virginia Board of Medicine has proven by clear and convincing evidence that Dr. Clarke purposefully failed to participate in good faith during the examination by Ralph S. Smith, M.D., which examination was reasonably ordered by the Board of Medicine, pursuant to West Virginia Code Section 30-3-14 (f), in violation of West Virginia Code and the Board's Legislative Rules. WEST VIRGINIA CODE § 30-3-14 (f); § 30-3-14 (c) (17). Such failure to participate in good faith is prima facie evidence of Respondent's inability to practice medicine and surgery competently and in compliance with the standards of acceptable and prevailing medical practice, pursuant to West Virginia Code.

WEST VIRGINIA CODE § 30-3-14 (f).

16. The West Virginia Board of Medicine may revoke, suspend or otherwise limit a medical license if a physician has engaged in dishonorable, unethical or unprofessional conduct of a character likely to deceive, defraud or harm any member of the public or has committed any act contrary to honesty, justice or good morals. Such dishonorable, unethical or unprofessional conduct includes conduct which has the effect of bringing the medical profession into disrepute. WEST VIRGINIA CODE § 30-3-14 (c) (17); 11 C.S.R. 1A-12.1 (a) (e), (j); 11 C.S.R. 1A-12.2 (d).

17. The West Virginia Board of Medicine has proven by clear and convincing evidence that on or about April 7, 2009, discharged a firearm multiple times in his residence, causing bullets to penetrate into the residence of his neighbor, thereby placing members of the public at risk for severe injury or death and thereby placing the medical profession into disrepute, in violation of West Virginia Code and Board of Medicine Legislative Rules. WEST VIRGINIA CODE § 30-3-14 (c) (17); 11 C.S.R. 1A-12.1 (a), (e), (j); 11 C.S.R. 1A-12.2 (d).

18. The West Virginia Board of Medicine has proven by clear and convincing evidence that Dr. Clark made a knowingly false statement to the Board's Investigator regarding the Board's investigation of the April 7, 2009, incident, thereby acting unprofessionally, dishonorably and contrary to honesty, justice and good morals, in violation of West Virginia Code and Board of Medicine Legislative Rules. WEST VIRGINIA CODE § 30-3-14 (c) (17); 11 C.S.R. 1A-12.1 (e), (j); 11 C.S.R. 1A-12.2 (d).

RECOMMENDED DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner respectfully **RECOMMENDS** that the Board of Medicine find that Respondent violated West Virginia Law and the Board of Medicine Legislative rules as set forth herein; and, therefore, that the Board make the following findings:

1. That it is proper and in the public interest, health, welfare and safety to **SUSPEND** Dr. Kevin M. Clarke's license to practice medicine or surgery in West Virginia for a period of one (1) year; and further,
2. That during the first eight (8) months of the suspension period, Dr. Clarke shall, at his own expense, successfully complete an Anger Management Treatment Program, to include a minimum of twelve (12) sessions, with a Mental Health Clinician who shall have a minimum of a Masters Degree in Mental Health and who can demonstrate training and expertise in the treatment of Anger Management; such clinician to be selected by Dr. Clarke and to be approved by the Board of Medicine; and further that such Mental Health Clinician shall make monthly written reports to the Board of Medicine regarding Dr. Clarke's progress, on or before the last day of each month; and further,
3. That after the eight (8) month period of suspension, Dr. Clarke shall undergo a Forensic Psychiatric evaluation by a Board-approved physician other than Dr. Miller or Dr. Smith; and further,
4. That it is proper and in the public interest, health, welfare and safety to place on **PROBATION** Dr. Kevin M. Clarke's license to practice medicine or surgery in West Virginia for a period of four (4) years following such period of suspension;

and further,

5. That during the periods of suspension and probation, Dr. Clarke shall obey all federal, state and local laws and all rules governing the practice of medicine in West Virginia; and further,
6. That during the periods of suspension and probation, Dr. Clarke shall not consume nor have in his possession any alcoholic beverages, including "non-intoxicating beer or wine," nor associate with persons possessing or consuming such beverages, nor frequent any establishment where the same are served or sold for consumption on the premises; and further,
7. That during the periods of suspension and probation, Dr. Clarke shall not consume nor have in his possession any controlled substances or drug paraphernalia other than that which may be prescribed for him by a licensed physician, nor associate with anyone possessing or consuming illegal controlled substances; and further,
8. That during the periods of suspension and probation, Dr. Clarke shall take physician-prescribed medications and over-the-counter medications only according to the specified directions; and further,
9. That during the periods of suspension and probation, Dr. Clarke shall submit to random drug and alcohol testing at the discretion of the Board at any time and that he shall immediately provide a sample of his blood, breath or urine, at the request of the Board or its Agent; and further,
10. That during the periods of suspension and probation, Dr. Clarke is prohibited from possessing or using any firearms; and further,

11. That during the period of probation, Dr. Clarke shall limit his work hours to no more than twelve (12) hours per shift and sixty (60) hours per week.

Entered: May 2, 2011

A handwritten signature in black ink, reading "Carole A. Lewis Bloom". The signature is fluid and cursive, with the first name "Carole" and last name "Bloom" being more prominent. It is written over a horizontal line.

Carole A. Lewis Bloom,
Designated Hearing Examiner
West Virginia State Bar No. 6867
Post Office Box 1652
Charleston, West Virginia 25326

Certificate of Service

I, ANNE WERUM LAMBRIGHT, independent counsel for the Board of Medicine in this matter, do hereby certify that service of the foregoing Decision has been made by hand delivery or by forwarding a true copy thereof in an envelope deposited in the regular course of the United States mail, certified with postage prepaid, on this the 16th day of May, 2011, addressed as follows:

Kevin M. Clarke, M.D.

c/o James McQueen, Jr. Esq.

Baker, Davis & McQueen, PLLC

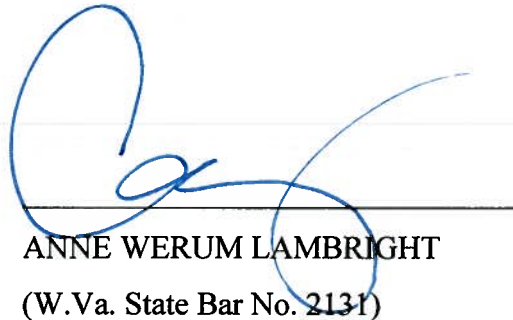
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ANNE WERUM LAMBRIGHT
(W.Va. State Bar No. 2131)

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